MOTION FILED
MAY 23 1994

5

No. 93-1674

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1993

THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK and JOHN BORDEN,
*Petitioners,*

v.

SHARON KARIBIAN and MARK URBAN,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS

JAN S. AMUNDSON
General Counsel
NATIONAL ASSOCIATION
OF MANUFACTURERS
1331 Pennsylvania Ave., N.W.
Suite 1500—North Lobby
Washington, D.C. 20004-1790
(202) 637-3055

DOUGLAS S. MCDOWELL
ANN ELIZABETH REESMAN *
KIMBERLY L. JAPINGA
MCGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600

*Attorneys for Amici Curiae Equal Employment Advisory Council and National Association of Manufacturers*

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

2 cy pd

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

---

No. 93-1674

---

THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK and JOHN BORDEN,
*Petitioners*,

v.

SHARON KARIBIAN and MARK URBAN,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

---

## MOTION OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE NATIONAL ASSOCIATION OF MANUFACTURERS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

---

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37.1 and .2 of the Rules of this Court, the Equal Employment Advisory Council ("EEAC") and the National Association of Manufacturers ("the NAM") respectfully move this Court for leave to file the accompanying brief *amici curiae* in support of the Petitioners in this case. The written consents of Petitioners Columbia University and John Borden, and Respondent Mark Urban, have been filed

with the Clerk of the Court. Respondent Sharon Karibian has refused consent.

In support of this motion, EEAC and the NAM by the following show that this brief brings relevant matters to the attention of the Court that have not already been brought to its attention by the parties.

1. EEAC is a voluntary association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes nearly 300 major U.S. corporations, as well as several associations which themselves have hundreds of corporate members. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives the Council a unique depth of understanding of the practical, as well as legal considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

2. The NAM is a voluntary business association of over 12,500 companies and subsidiaries, employing eighty-five percent of all manufacturing workers, and producing over eighty percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with the NAM through its Associations Council and National Industrial Council. The NAM and these councils are vitally interested in preventing sexual harassment in the workplace.

3. All of EEAC's and the NAM's members, and the constituents of their association members, are subject to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII), as well as

other equal employment statutes and regulations. As employers, EEAC's and the NAM's members and member constituencies have a strong interest in maintaining workplaces that are free from sexual harassment. EEAC's and the NAM's members have followed this Court's guidance in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986), for eliminating and combating sexual harassment by adopting policies expressly forbidding supervisors and employees from engaging in sexually harassing conduct; by publicizing in employee manuals and notices an employee's right to be free from sexual harassment in the workplace; and by training supervisors and employees to recognize and halt harassment in the workplace. In addition, many members have implemented formal anti-harassment procedures that allow an aggrieved employee to seek redress from higher management authorities, or even bring an internal complaint against a supervisor or co-worker who has engaged in harassment in the workplace. These policies call for prompt and effective remedial action by the employer, including discipline and, where appropriate, discharge of the offender.

4. Thus, the issues presented in the petition are extremely important to the nationwide constituency that EEAC and the NAM represent. The court below held that an employer will be strictly liable for a supervisor's sexual harassment, despite an employer's strong policies against sexual harassment and reasonable complaint procedures for resolving sexual harassment claims. By adopting an absolute standard for sexual harassment, the Second Circuit is in direct conflict with this Court's decision in *Meritor*, which said that employers are not always automatically liable for sexual harassment by their supervisors.

Further, the decision below conflicts with those of other circuits which consider an employer's express policy against sexual harassment and its procedures for resolving sexual harassment complaints when determining employer liability.

5. Because of its interest in the nation's civil rights laws, EEAC has, since its founding in 1976, filed briefs as *amicus curiae* in cases before this Court, the United States Circuit Courts of Appeals and various state supreme courts. As part of this *amicus* activity, EEAC participated as *amicus curiae* in *Meritor* as well as the recently decided *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367 (1993). In addition, EEAC has filed briefs in a number of other cases involving sexual harassment issues. *See, e.g., Chrysler Corp. v. International Union, Allied Indus. Workers of Am., AFL-CIO, cert. denied*, 113 S. Ct. 304 (1992) (petition seeking review of lower court decision upholding arbitration award reinstating an employee terminated for sexual harassment); *Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters*, 969 F.2d 1436 (3d Cir.), *cert. denied*, 113 S. Ct. 660 (1992) (overturning arbitration award reinstating employee terminated for sexual harassment); *Stockstill v. Shell Oil Co.*, 3 F.3d 868 (5th Cir. 1993) (defamation suit based on employer's response to government investigator's inquiry); *Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59 (2d Cir. 1992) (addressing the effect of an employer's prompt and effective response to a complaint of sexual harassment); and *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466 (11th Cir. 1991) (age discrimination claim by employee terminated for sexual harassment).

6. Because of their significant experience, EEAC and the NAM are uniquely situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers generally, as opposed to its significance to the immediate parties.

WHEREFORE, for the reasons stated, the Equal Employment Advisory Council and the National Association of Manufacturers respectfully request the Court to file the accompanying brief as *amici curiae*.

Respectfully submitted,

JAN S. AMUNDSON
General Counsel
NATIONAL ASSOCIATION
OF MANUFACTURERS
1331 Pennsylvania Ave., N.W.
Suite 1500—North Lobby
Washington, D.C. 20004-1790
(202) 637-3055

DOUGLAS S. MCDOWELL
ANN ELIZABETH REESMAN *
KIMBERLY L. JAPINGA
MCGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600

*Attorneys for Amici Curiae Equal Employment Advisory Council and National Association of Manufacturers*

* Counsel of Record

May 23, 1994

TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | iii |
| INTEREST OF THE *AMICI CURIAE* | 1 |
| STATEMENT OF THE CASE | 2 |
| SUMMARY OF REASONS FOR GRANTING THE WRIT | 4 |
| REASONS FOR GRANTING THE WRIT | 6 |
| I. THE COURT OF APPEALS' HOLDING THAT AN EMPLOYER IS STRICTLY LIABLE FOR A SUPERVISOR'S SEXUAL HARASSMENT REGARDLESS OF THE EFFECTIVENESS OF THE EMPLOYER'S COMPLAINT PROCEDURES OR THE ABSENCE OF NOTICE TO THE EMPLOYER OF THE ALLEGED CONDUCT IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN *MERITOR SAVINGS BANK v. VINSON* | 6 |
| A. This Court Held In *Meritor* That Title VII Does Not Make Employers Strictly Liable For Sexual Harassment, But Requires Instead That Courts Apply Common Law Agency Principles | 6 |
| B. Under Common Law Agency Principles, A Supervisor Lacks "Apparent Authority" To Commit Sexual Harassment Where The Employer Has A Strong Policy Against Sexual Harassment And An Effective Complaint Procedure | 7 |
| C. The Decision Below In Effect Held The Employer Strictly Liable For Sexual Harassment By A Supervisor, And Thus Conflicts With The Requirements Of *Meritor* | 12 |

TABLE OF CONTENTS—Continued

Page

II. THE DECISION BELOW ALSO CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS THAT HAVE HELD THAT AN EMPLOYER IS NOT LIABLE FOR A SEXUALLY HOSTILE WORKING ENVIRONMENT WHERE THE EMPLOYER HAS AN EXPRESS POLICY AGAINST SEXUAL HARASSMENT AND HAS ADEQUATE PROCEDURES FOR INVESTIGATING AND RESOLVING SEXUAL HARASSMENT CLAIMS ..... 14

III. IF ALLOWED TO STAND, THE SECOND CIRCUIT'S HOLDING THAT EMPLOYERS ARE STRICTLY LIABLE FOR SUPERVISORS' ACTS OF SEXUAL HARASSMENT WILL HAVE SERIOUS ADVERSE POLICY CONSEQUENCES ..... 16

A. Employers Have Instituted Strong Policies Against Sexual Harassment Based On This Court's Guidance In *Meritor* ..... 16

B. Failure To Insulate Employers With Strong Policies Against Sexual Harassment Will Be Counterproductive To The Goal Of Eradicating Sexual Harassment In The Workplace ..... 17

CONCLUSION ..... 20

## TABLE OF AUTHORITIES

CASES — Page

*Carmon v. Lubrizol Corp.*, 17 F.3d 791 (5th Cir. 1994) ..... 14-15
*Kauffman v. Allied Signal, Inc., Autolite Division*, 970 F.2d 178 (6th Cir.), *cert. denied*, 113 S. Ct. 831 (1992) ..... 16
*Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986) ..... 4-7, 10-11
*Nash v. Electrospace System, Inc.*, 9 F.3d 401 (5th Cir. 1993) ..... 15-16
*Saxton v. AT&T*, 10 F.3d 526 (7th Cir. 1993) ..... 14
*Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311 (11th Cir. 1989) ..... 16
*Swentek v. USAir, Inc.*, 830 F.2d 552 (4th Cir. 1987) ..... 16

STATUTES

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ..... 11
§ 2000e-2(a)(1) ..... 11

REGULATIONS

29 C.F.R. § 1604.11 ..... 11-12

MISCELLANEOUS

Equal Employment Opportunity Commission, *Policy Guidance on Current Issues of Sexual Harassment*, No. N-915-050 (March 19, 1990) ..9-10, 17
Restatement (Second) of Agency (1958) .....9-10, 12, 17
§ 219(1) ..... 7-9
§ 219(2) ..... 7
§ 228(1) ..... 8-9
§ 228(2) ..... 9
§ 230 ..... 8

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

---

No. 93-1674

---

THE TRUSTEES OF COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK and JOHN BORDEN,
*Petitioners*,

v.

SHARON KARIBIAN and MARK URBAN,
*Respondents*.

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

---

## BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS

---

The Equal Employment Advisory Council ("EEAC") and the National Association of Manufacturers ("the NAM") respectfully submit this brief *amici curiae* contingent upon the granting of the accompanying motion for leave. The brief supports the petition for a writ of certiorari filed in this case by Columbia University and John Borden, and urges reversal of the decision below.

### INTEREST OF THE *AMICI CURIAE*

The interest of the *amici curiae* is fully set forth in the accompanying motion.

## STATEMENT OF THE CASE

In 1987, Respondent Sharon Karibian was a part-time student at Columbia University's School of General Studies. Pet. App. A4.[1] She also was a part-time clerical worker for the University's fund-raising operation, the Telefund at Columbia ("Telefund"). *Id.* The Telefund operated under the aegis of Columbia University's Office of University Development and Alumni Relations ("UDAR"), but was designed and administered by an outside consultant, Philanthropy Management, Inc. ("PMI"). *Id.* During her tenure with the Telefund, Karibian was steadily promoted, eventually securing the highest position at the Telefund as Project Director. Pet. App. A5.

Karibian met Respondent Mark Urban in the spring of 1987, before Urban began working for Columbia. Pet. App. A18. She alleges that Urban pressured her into having sexual relations beginning shortly after they met and continuing through 1989. *Id.* In September 1987, Columbia appointed Urban to a position at UDAR, Pet. App. A4, but he did not become Karibian's direct supervisor until the fall of 1989 when Karibian became Project Director of the Telefund. Pet. App. A5.

Columbia has a set procedure for dealing with sexual harassment, set forth in a bulletin entitled "Protection Against Sexual Harassment." Pet. App. A18. It begins with an unambiguous declaration that "the

---

[1] Citations to the Appendix to the Petition for a Writ of Certiorari are designated as Pet. App. ——. The opinion of the Court of Appeals for the Second Circuit below, reported at 14 F.3d 773, is reproduced at Pet. App. A1-A16. The opinion of the district court, reported at 812 F. Supp. 413, is reproduced at Pet. App. A17-A24.

University prohibits sexual harassment of any member of the Columbia community." Pet. App. A18. It then outlines three available avenues of redress for employees who feel they are experiencing sexual harassment: a conference with a member of the University Panel on Sexual Harassment; a discussion with the University's Office of Equal Opportunity and Affirmative Action ("EOAA"); and the university's formal grievance procedure. Pet. App. A18-19. An individual may select the procedure best suited to his or her needs. Pet. App. A19. The grievance procedure generates an investigation that may lead to remedial action. Pet. App. A19.

In September 1988, Karibian consulted both with a Panel member and an EOAA coordinator. Pet. App. A5. Both of these meetings were kept confidential at Karibian's request. *Id.*

It was not until January 30, 1990 that Karibian went to the Director of Development Services at UDAR and complained that Urban was undermining her in her job as Project Director of Telefund since her sexual relationship with Urban had ended. Pet. App. A6. At the same time, she met again with the EOAA coordinator, this time abandoning her confidentiality request. Pet. App. A6. Columbia then began an investigation, promptly removed Karibian from Urban's supervision, and asked Urban to resign. Pet. App. A23.

Karibian sued Columbia, Urban, and Urban's superior, claiming that Urban's actions constituted sexual harassment in violation of Title VII. The district court, applying this Court's decision in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986), granted

summary judgment for the defendants. Pet. App. A23. The court concluded that Karibian, who had suffered no economic harm, had no valid claim under a *quid pro quo* theory. Pet. App. A21. Since Columbia had provided a "reasonable avenue for making complaints," *id.*, and had taken "prompt and effective remedial action" as soon as "plaintiff made a complaint of such a nature as to require action," Pet. App. A23, the district court likewise found no triable issue of fact on Karibian's hostile environment claim. *Id.*

The Second Circuit reversed on both grounds. First, the Second Circuit concluded that the *quid pro quo* theory requires no showing of actual economic loss where the employee submits to the supervisor's advances, Pet. App. A10-11. Second, the court concluded that Columbia also was liable to Karibian on a hostile environment theory because it was liable under a *quid pro quo* theory, "regardless of the absence of notice or the reasonableness of Columbia's complaint procedures." Pet. App. A14. Columbia has petitioned this Court for a writ of certiorari.

## SUMMARY OF REASONS FOR GRANTING THE WRIT

The decision of the Second Circuit below, in effect, holds an employer strictly liable for a supervisor's acts of sexual harassment. This holding conflicts directly with this Court's decision in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986), where this Court stated, "[W]e hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors." *Id.* at 73.

The court below also failed to follow *Meritor's* direction to apply common law agency principles when assessing an employer's liability for sexual harassment. Under these principles, an employer with a strong policy against sexual harassment coupled with an effective grievance procedure cannot be said to have conferred "apparent authority" on a supervisor to engage in sexual harassment.

In addition, the decision below conflicts with those of several other circuit courts which hold that an employer does not incur liability for a hostile work environment created by a supervisor unless it knew or should have known of the misconduct and failed to take effective appropriate action. Where an employer has adopted a strong company policy prohibiting workplace sexual harassment and has established an adequate procedure for addressing complaints, the employer cannot be liable for a supervisor's or employee's creation of a hostile environment of which the employer had no actual or constructive knowledge if the alleged victim failed to take advantage of that procedure, or if the employer took prompt and effective action.

Moreover, agency principles and important policy concerns dictate that employers should not be held strictly liable for sexual harassment by a supervisor. As a practical matter, a large employer with a strong anti-harassment policy and accessible procedure cannot be deemed to have authorized a manager to engage in sexual harassment. A strict liability approach may encourage some employers to weaken their sexual harassment complaint procedures rather than generate claims that, if substantiated, could lead to only one conclusion—employer liability.

The decision below has undermined the enforcement of Title VII and caused uncertainty for employers seeking to fulfill their obligation to eliminate workplace sexual harassment, and should be reversed by this Court.

## REASONS FOR GRANTING THE WRIT

### I. THE COURT OF APPEALS' HOLDING THAT AN EMPLOYER IS STRICTLY LIABLE FOR A SUPERVISOR'S SEXUAL HARASSMENT REGARDLESS OF THE EFFECTIVENESS OF THE EMPLOYER'S COMPLAINT PROCEDURES OR THE ABSENCE OF NOTICE TO THE EMPLOYER OF THE ALLEGED CONDUCT IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN *MERITOR SAVINGS BANK v. VINSON*

#### A. This Court Held in *Meritor* That Title VII Does Not Make Employers Strictly Liable for Sexual Harassment, But Requires Instead That Courts Apply Common Law Agency Principles

This Court has ruled that Title VII does not render employers automatically liable for sexual harassment. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986). In *Meritor*, both parties sought to have the Court establish a standard for employer liability. While this Court declined to issue a definitive rule, it clearly rejected a strict liability standard, holding that "the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors." *Id.*

Instead, this Court stated:

> [C]ongress wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any

> "agent" of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. See generally Restatement (Second) of Agency §§ 219-237 (1958).

*Id.* The Court encouraged employers to adopt effective anti-harassment policies including, at a minimum, (1) a specific prohibition against sexual harassment and (2) a procedure that is "calculated to encourage victims of harassment to come forward," including more than one avenue of complaint. *Id.* at 72-73.

**B. Under Common Law Agency Principles, a Supervisor Lacks "Apparent Authority" To Commit Sexual Harassment Where The Employer Has A Strong Policy Against Sexual Harassment and an Effective Complaint Procedure**

Common law agency principles establish that "[a] master is subject to liability for the torts of his servants committed *while acting in the scope of their employment.*" *Restatement (Second) of Agency* § 219(1) (1958) (emphasis added). Conversely,

> A master is *not* subject to liability for the torts of his servants acting *outside* the scope of their employment, unless:
>
> (a) the master intended the conduct or the consequences, or
>
> (b) the master was negligent or reckless, or
>
> (c) the conduct violated a non-delegable duty of the master, or
>
> (d) the servant purported to act or to speak on behalf of the principal *and* there was reliance upon apparent authority, or he

> was aided in accomplishing the tort by the existence of the agency relation.

*Restatement (Second) of Agency* § 219(2) (1958) (emphasis added).

A supervisor generally is acting within the scope of employment when he or she hires, fires, disciplines, promotes, or regulates the working conditions of the employees he or she is supervising.[2] The scope of employment, however, does not include carrying out those activities in a manner expressly forbidden by the employer.[3] In Policy Guidance issued by the Equal Employment Opportunity Commission, the federal agency having enforcement authority over Title VII, the agency noted that "[i]t will rarely be

---

[2] The Restatement defines "scope of employment" as follows:

> Conduct of a servant is within the scope of employment if, but only if:
>
> (a) it is of the kind he is employed to perform;
>
> (b) it occurs substantially within the authorized time and space limts;
>
> (c) it is actuated, at least in part, by a purpose to serve the master, and
>
> (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

*Restatement (Second) of Agency,* § 228(1).

[3] *Restatement (Second) of Agency,* § 230, comment c. (1958) states in pertinent part:

> Prohibition to do any acts except those of a certain class may indicate that the scope of employment extends only to acts of that class. Furthermore, the prohibition by the employer may be a factor in determining whether or not, in an otherwise doubtful case, the act of the employee is incidental to the employment; it accentuates the limits of the servant's permissible action and hence makes it more easy to find that the prohibited act is entirely beyond the scope of employment.

the case that an employer will have authorized a supervisor to engage in sexual harassment." *Policy Guidance on Current Issues of Sexual Harassment*, No. N-915-050, at 25, March 19, 1990 ("EEOC Policy Guidance"). Thus, sexual harassment can hardly be considered within the scope of employment.[4]

Nevertheless, liability for a supervisor's sexual harassment still could be imputed to the employer if the employer gave the supervisor "apparent authority" to do so.[5] As the EEOC's Policy Guidance explains:

> [*I*]*n the absence* of a strong, widely disseminated, and consistently enforced employer policy against sexual harassment, and an effective complaint procedure, employees could reasonably believe that a harassing supervisor's actions will be ignored, tolerated, or even condoned by upper management.

EEOC Policy Guidance at 25 (emphasis added). But, the Commission continues:

> [A]n employer can divest its supervisors of this apparent authority by implementing a strong policy against sexual harassment and maintaining an effective complaint procedure. When employees know that recourse is available, they cannot reasonably believe that a harassing work en-

---

[4] Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

*Restatement (Second) of Agency*, § 228(2).

[5] *Restatement (Second) of Agency*, § 219(2)(d), *supra* pp. 7-8.

> vironment is authorized or condoned by the employer.

*Id.* at 26.[6]

*Meritor*, by following agency principles, established the foundation for applying this principle to sexual harassment cases. The Court in *Meritor* considered both the existence of the employer's policy and the effectiveness of its grievance procedure, and found them wanting. Meritor Bank's policy did not specifically address sexual harassment, and the procedure would have required the victim to complain to the alleged harasser. Thus, the Court rejected the employer's contention that its policy and procedure, coupled with the victim's failure to invoke the procedure, shielded the employer from liability. The Court noted, however, that "Petitioner's contention

---

[6] The Policy Guidance expressly limits this interpretation to "hostile environment" cases. EEOC Policy Guidance at 26 n.36. The EEOC and some courts have presumed, as did the decision below, that an employer is absolutely liable for a supervisor's *quid pro quo* harassment. *Id.* at 21.

In adopting such an absolute liability approach, the EEOC suggests that this Court in *Meritor* tacitly approved such a position. EEOC Policy Guidance at 21. As noted above, however, this Court in *Meritor* declined to create a definitive rule on employer liability, but directed courts to apply agency principles when assessing employer liability. *Meritor*, 477 U.S. at 72. Since *Meritor* was a hostile work environment case, this Court did not address employer liability for a *quid pro quo* case and did not state that the liability standards for hostile work environment and *quid pro quo* cases should be different.

On the contrary, application of traditional agency principles to *quid pro quo* situations compels the conclusion that an employer is not automatically liable for its supervisor's acts of *quid pro quo* sexual harassment. Rather, an employer would be held liable for a supervisor's *quid pro quo* demands if and only if agency principles so required.

that respondent's failure should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward." *Meritor*, 477 U.S. at 73.

This language suggests that an employer can avoid liability where it has such a policy and procedures because it makes it clear to employees that a supervisor does not have "apparent authority" to discriminate. At the very least, it mandates consideration of the existence and effectiveness of an employer's policy and procedures before imposing liability.

Accordingly, regardless of whether harassing behavior is characterized as "*quid pro quo*" or "hostile environment" sexual harassment,[7] common law ag-

---

[7] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, prohibits, *inter alia*, sex discrimination in the workplace. 42 U.S.C. § 2000e-2(a)(1). Sexual harassment is included in the Title VII prohibition. *Meritor*, 477 U.S. 57, 64 (1986).

The Equal Employment Opportunity Commission promulgated Guidelines in 1980 applying Title VII to sexual harassment in the workplace. 29 C.F.R. § 1604.11. The Guidelines recognized two specific types of harassment as unlawful under Title VII: hostile environment and *quid pro quo*.

According to the EEOC Guidelines, hostile environment sexual harassment occurs when

> [u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R. § 1604.11(a)(1) and (3), quoted with approval in *Meritor*, 477 U.S. at 65. *Quid pro quo* sexual harassment occurs when "submission to or rejection of [unwelcome sexual] conduct by an individual is used as the basis for

ency principles dictate that an employer's policy and procedures be examined to determine whether the supervisor in question indeed had "apparent authority" to do the acts alleged, and that the employer be shielded from liability where the supervisor did not. Where the employer, as this Court and the EEOC have suggested; (1) has a policy prohibiting sexual harassment in the workplace; and (2) has in place an effective mechanism that encourages employees to report harassing behavior and provides for a prompt investigation and effective response to such claims, it cannot be said that the employer condoned such behavior. EEOC Policy Guidance at 26.

To hold employers who have strong policies and effective procedures in place liable for sexual harassment in effect imposes liability without fault. Where an employer has a well-publicized policy forbidding sexual harassment and an accessible complaint procedure offering relief, a victim of sexual harassment cannot reasonably argue that the perpetrator had "apparent authority" to engage in such conduct. In such a case, the victim need only activate the employer's complaint procedure to seek corrective action.

### C. The Decision Below In Effect Held The Employer Strictly Liable For Sexual Harassment By A Supervisor, And Thus Conflicts With The Requirements Of *Meritor*

While the Second Circuit below said it was applying agency principles, it actually held the employer strictly liable for a supervisor's acts of sexual harassment. The court below first held Columbia strictly liable on a *quid pro quo* theory, stating "because the

---

employment decisions affecting such individual. . . ." 29 C.F.R. § 1604.11(a)(2).

*quid pro quo* harasser, by definition, wields the employer's authority to alter the terms and conditions of employment—either actually or apparently—the law imposes strict liability on the employer for *quid pro quo* harassment." Pet. App. A9. The court then effectively concluded that where a supervisor is involved and *quid pro quo* is found, the employer also is automatically liable where the circumstances constitute a hostile environment *regardless of whether the employer had an effective complaint procedure*:

> [w]e agree with Karibian that Columbia would be liable for Urban's alleged harassment *regardless of the absence of notice or the reasonableness of Columbia's complaint procedures.*
>
> * * * *
>
> Our conclusion that Columbia would be liable on a hostile environment claim for the harassment alleged by Karibian follows naturally from our earlier conclusion that Karibian stated a valid claim for *quid pro quo* harassment. . . . It would be a jarring anomaly to hold that conduct which always renders an employer liable under a *quid pro quo* theory does not result in liability to the employer when that same conduct becomes so severe and pervasive as to create a discriminatorily abusive work environment.

Pet. App. A14-15 (emphasis added) (citations omitted).

Thus, while the Second Circuit paid lip service to agency principles, it misapplied them to adopt a rule of strict liability whenever a supervisor is involved in sexual harassment. Accordingly, the decision below conflicts with this Court's decision in *Meritor*.

## II. THE DECISION BELOW ALSO CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS THAT HAVE HELD THAT AN EMPLOYER IS NOT LIABLE FOR A SEXUALLY HOSTILE WORKING ENVIRONMENT WHERE THE EMPLOYER HAS AN EXPRESS POLICY AGAINST SEXUAL HARASSMENT AND HAS ADEQUATE PROCEDURES FOR INVESTIGATING AND RESOLVING SEXUAL HARASSMENT CLAIMS

The Second Circuit's disregard for an employer's express policy against sexual harassment and its grievance procedure for resolving claims is in direct conflict with several other circuits, which have ruled that an employer is not liable for hostile environment sexual harassment unless it knew or should have known of the situation and failed to take prompt and appropriate remedial action.

The Seventh Circuit in *Saxton v. AT&T*, 10 F.3d 526 (7th Cir. 1993), while concluding that the complained-of behavior was insufficient to constitute a hostile working environment, held that "Saxton's claim must fail in any event, because she has not demonstrated that AT&T failed to take prompt and appropriate remedial action upon discovering the harassment." *Id.* at 535. In *Saxton*, AT&T officials began an investigation the day they received Saxton's complaint, completed a detailed report within two weeks, and within five weeks transferred the accused harasser to another department. *Id.* These actions, the Seventh Circuit concluded, were "steps reasonably likely to stop the harassment" sufficient to relieve the employer of liability. *Id.* at 536.

Likewise, in *Carmon v. Lubrizol Corp.*, 17 F.3d 791 (5th Cir. 1994), the Fifth Circuit refused to hold an employer liable for sexual harassment because:

> Lubrizol twice did what a company *ought* to do when faced with allegations that an employee has been subjected to sexual harassment, engendering a hostile work environment: It took the allegations seriously, it conducted prompt and through investigations, and it immediately implemented remedial and disciplinary measures based on the results of such investigations. Holding a company such as Lubrizol liable after it has taken such action would produce truly perverse incentives benefitting no one, least of all actual or potential victims of sexual harassment.

*Id.* at 795-796. (emphasis in the original).

In a similar case, *Nash v. Electrospace System, Inc.*, 9 F.3d 401 (5th Cir. 1993), the Fifth Circuit also absolved an employer from liability for hostile environment harassment by her line supervisor, stating:

> While *Harris* proclaims that sexually hostile or abusive work environments are no longer to be tolerated under Title VII, that fact does not transform Title VII into a strict liability statute for employers. An employer is liable only if it knew or should have known of the employee's offensive conduct and did not take steps to repudiate that conduct and eliminate the hostile environment.

*Id.* at 404 (referring to this Court's decision in *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367 (1993)). The court observed that the company had a written policy against sexual harassment that had been in effect for a number of years. *Id.* at 404. Further, the company had a formal grievance procedure that the court said "[s]hould be counted strongly in [the company's] favor here because Nash—per her

deposition testimony—knew Sharp had no authority to terminate her." *Id.* at 404 n.2.

Other circuits also have refused to hold employers strictly liable for hostile working environments where the employer had a strong policy against sexual harassment and an adequate procedure for resolving claims.[8]

Thus, the Second Circuit is out of step with other circuits that do not hold employers strictly liable for sexual harassment where they have taken appropriate measures to prohibit sexual harassment in the workplace. This conflict must be resolved by granting the petition for writ of certiorari in this case.

## III. IF ALLOWED TO STAND, THE SECOND CIRCUIT'S HOLDING THAT EMPLOYERS ARE STRICTLY LIABLE FOR SUPERVISORS' ACTS OF SEXUAL HARASSMENT WILL HAVE SERIOUS ADVERSE POLICY CONSEQUENCES

### A. Employers Have Instituted Strong Policies Against Sexual Harassment Based On This Court's Guidance In *Meritor*

Based on this Court's *Meritor* decision, employers such as EEAC's and the NAM's member companies have established clear and unequivocal policies forbidding sexual harassment in the workplace, and have

---

[8] *See, e.g., Swentek v. USAir, Inc.*, 830 F.2d 552 (4th Cir. 1987) (employer not liable for "hostile environment" sexual harassment under Title VII when it took immediate action, including investigation and discipline, upon receipt of complaint); *Kauffman v. Allied Signal, Inc., Autolite Div.*, 970 F.2d 178 (6th Cir.), *cert. denied*, 113 S. Ct. 831 (1992) (rejects strict liability for hostile environment cases); and *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989) ("strict liability is illogical in a pure hostile environment setting").

instituted procedures for prompt and appropriate handling of complaints. These employers have put into practice the EEOC's strong recommendation that:

> [a]n effective preventive program should include an explicit policy against sexual harassment that is clearly and regularly communicated to employees and effectively implemented. The employer should affirmatively raise the subject with all supervisory and non-supervisory employees, express strong disapproval, and explain the sanctions for harassment. The employer should also have a procedure for resolving sexual harassment complaints. The procedure should be designed to "encourage victims of harassment to come forward" and should not require a victim to complain first to the offending supervisor. *See Vinson*, 106 S. Ct. at 2408. It should ensure confidentiality as much as possible and provide effective remedies, including protection of victims and witnesses against retaliation.

EEOC Policy Guidance at 29. Indeed, some companies go so far to require employees who observe sexual harassment to report it. They make failure to report the activity a ground for discipline, even if the employee was just an observer, and not a participant in the conduct.

### B. Failure To Insulate Employers With Strong Policies Against Sexual Harassment Will Be Counterproductive To The Goal Of Eradicating Sexual Harassment In The Workplace

When a defendant employer has in place a strong policy forbidding sexual harassment and an effective complaint procedure, allowing a Title VII recovery to a plaintiff who has failed to report harassing con-

duct is tantamount to strict liability. Any standard imputing liability to the employer merely because the perpetrator had supervisory authority over the individual ignores the realities of today's workplace and the size of the nation's largest employers. A company with thousands of employees necessarily has many layers of management responsibility, from the CEO down to first-line managers, with many increments of authority in between. It is unreasonable to suggest that merely because some supervisory responsibilities have been delegated to a manager, the company is strictly liable when that manager engages in conduct that has been expressly prohibited by the company.

As a practical matter, where the affected employee does not make use of an anti-harassment policy, a large employer may have no way of knowing that harassing behavior is occurring, assuming that there is no visible offensive conduct that would create constructive knowledge. Lacking such actual knowledge or any reason to know that unlawful conduct is occurring, the employer is unable to take steps to protect the victim from actions contrary to company policy. Thus, an employer that has taken such precautions cannot be responsible under any theory if it does not know or have reason to know of the conduct and thus has no opportunity to take appropriate action.

As the EEOC's guidance suggests, a good procedure encourages employees to report incidents of harassment, and includes methods to bypass the direct supervisor if that person also is the harasser. A plaintiff's unexcused failure to make use of an available recourse that could have remedied the situation must negate employer liability. Even the most conscientious, enlightened employer cannot control every

day-to-day action of every employee in each remote location. An employer must know of harassing behavior before it can take action to halt it. Holding such an employer liable for the actions of a supervisor that violates an express company policy when the employer did not know, and did not have reason to know of the offensive conduct, unfairly makes that employer a "deep pocket" liable for a situation over which it had no control.

Finally, prompt and effective action by an employer who *is* informed of harassing behavior likewise should obviate liability. An employer who can show that, upon learning that harassment has occurred, it conducted a thorough and *bona fide* investigation, reached a rational conclusion and took appropriate action, should be credited for those efforts.

If the Second Circuit's holding of strict liability for sexual harassment is allowed to stand, some employers may decide that a highly publicized policy against sexual harassment and an aggressive investigation of those allegations will only work against their interests. With strict liability as the rule, it is likely that some employers will view complaint procedures as merely encouraging claims for which they then prove themselves liable if they uncover sexual harassment. These employers may elect to soft-pedal previously strong policies against harassment, deciding that while they can handle the few cases that may arise on their own, there is no point in providing encouragement.

This result would undermine years of progress toward the elimination of sexual harassment in the workplace. While many employers undoubtedly will retain their strong policies because it is the "right thing to do," even they may have some trepidation

about conducting a thorough investigation, since doing so will only confirm their liability under a strict liability standard.

## CONCLUSION

For the foregoing reasons, EEAC and the NAM respectfully submit that the petition for writ of certiorari should be granted.

Respectfully submitted,

JAN S. AMUNDSON
General Counsel
NATIONAL ASSOCIATION
OF MANUFACTURERS
1331 Pennsylvania Ave., N.W.
Suite 1500—North Lobby
Washington, D.C. 20004-1790
(202) 637-3055

DOUGLAS S. MCDOWELL
ANN ELIZABETH REESMAN *
KIMBERLY L. JAPINGA
MCGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600

*Attorneys for Amici Curiae Equal Employment Advisory Council and National Association of Manufacturers*

* Counsel of Record

May 23, 1994